No. 11771

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WILLIAM P. STUART, United States Collector of Internal Revenue in and for the State of Arizona,

Appellant,

vs.

HENRY ONG, President of Sun Kwung Tong Company, an association; CHINESE CHAMBER OF COMMERCE OF PHOENIX, a corporation; FRANK ONG, as Chairman of the Wing Mae School in China, an association; YUEN LUNG, Chairman of the Chinese School of Phoenix, Arizona, an association; and FRED WONG, Chairman of the Chinese War Relief Association, an association,

Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ARIZONA

BRIEF FOR THE APPELLANT

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INDEX

CITATIONS

Cases

STATUTE

MISCELLANEOUS

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OPINION BELOW

The District Court did not file a written opinion.

JURISDICTION

This appeal involves a suit instituted against the Collector of Internal Revenue on March 1, 1946 (R.20)

1 Henry Ong, president of the Sun Kwung Tong Company, is not a party to this appeal, by reason of the order entered by the District Court (R.52) dismissing the fourth cause of action (R.15-16) with prejudice.

to recover the aggregate sum of $20,100 alleged by appellees in five causes of action to represent trust funds belonging to them and taken from the possession of one Ung Too Thet, alias Ung Kok Si, a taxpayer, on or about October 11, 1945, at the time of his arrest by United States narcotic agents for violation of the Harrison Narcotic Act and the Import and Export Drug Act, and turned over to the Collector (R.11,13,14,15-16,17). Appellees claim that prior to October 11, 1945, the money had been delivered to the taxpayer, as treasurer of each respective association, to be held by him for and in their behalf; that the money was their property and not the property of the taxpayer, and that the taxpayer was holding the fund as trustee for each association. (R. 11,12,14,15,17.) Of the amount seized from the taxpayer, and turned over to the Collector, $20,915.02 was applied against unpaid income tax assessments made against the taxpayer, and which amount was thereafter covered and deposited into the Treasury of the United States. (R.50-51.) Appellees claim that $20,100 of the amount seized was wrongfully applied against the taxpayer's unpaid taxes; that at the time the suit was instituted the Collector was in possession of the $20,100 belonging to them, and that although demand for its return was made, the Collector refused to deliver or return any part thereof to them. (R. 12,13,15,16,18.) No claims for refund for the recovery of the fund in controversy were filed by appellees as provided by Section 3772 of the Internal Revenue Code (R.51.) Appellees attempted to invoke jurisdiction of the District Court, presumably under the provisions of Section 24, Fifth, of the Judicial Code. A money judgment for $17,453.81 in favor of appellees was originally entered on March 21, 1947. (R. 5, 41-43.) A motion for a new trial was filed by the Collector on March 31, 1947. (R. 5, 43-46.) On May 23, 1947, the District Court granted the motion for

new trial as to the fourth cause of action and denied it as to the remaining causes of action. (R. 5, 48.) On May 26, 1947, the Collector filed a motion to vacate and set aside the judgment and to dismiss the complaint for lack of jurisdiction (R. 6, 49-50), supported by an affidavit of the Collector (R. 50-51), and on the same date, the court below denied the motion and entered a final judgment (R. 52.) Notice of appeal was timely filed on August 7, 1947 (R. 53), pursuant to the provisions of Section 128 (a) of the Judicial Code, as amended.

QUESTIONS PRESENTED

1. Whether the District Court had jurisdiction to entertain a suit against the Collector for the recovery of money belonging to appellees, which had been seized from the taxpayer and applied to unpaid taxes assessed against him, and thereafter deposited into the Treasury of the United States, where no claim for refund had theretofore been filed as required by Section 3772 of the Internal Revenue Code.

2. Whether the District Court had jurisdiction to enter a money judgment against the Collector under the circumstances involved here.

STATUTE INVOLVED

Internal Revenue Code:

SEC. 3772. SUITS FOR REFUND.

(a) *Limitations.*

(1) *Claim.*—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in

any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

(2) *Time.*—No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of two years from the date of mailing by registered mail by the Commissioner to the taxpayer of a notice of the disallowance of the part of the claim to which such suit or proceeding relates.

* * *

(26 U.S.C. 1940 ed., Sec. 3772.)

SEC. 3971. DEPOSIT OF COLLECTIONS.

(a) *General Rule.*—Except as provided in subsection (b), the gross amount of all taxes and revenues received under the provisions of this title, and collections of whatever nature received or collected by authority of any internal revenue law, shall be paid daily into the Treasury of the United States under instructions of the Secretary of the Treasury of the United States under instructions of the Secretary as internal revenue collections, by the officer receiving or collecting the same, without any abatement or deduction on account of salary, compensation, fees, costs, charges, expenses, or claims of any description. A certificate of such payment, stating the name of the depositor and the specific account on which the deposit was made, signed by the Treasurer, designated depositary, or proper officer of a deposit bank, shall be transmitted to the Commissioner.

* * *

(26 U.S.C. 1940 ed., Sec. 3971.)

STATEMENT

On or about October 11, 1945, Ung Too Thet, alias Ung Kok Si, the taxpayer involved herein, was engaged in the illicit opium traffic at his place of business, 113 Madison Street, Phoenix, Arizona, at which time he was arrested by agents of the United States NarcoticBureau. (R. 23, 135.) At the time of his arrest a search was made of his premises, resulting in the discovery of a large amount of opium, as well as a safe containing some $32,000 in cash and checks which were seized as evidence by the narcotic agents (R. 23, 138-139, 146) and turned over to the Collector (R.139).

Theretofore, delinquent assessments had been duly and regularly made against the taxpayer for unpaid 1943 and 1944 income taxes in the total amount, including interest and penaltiies, of $25,893.11. (R. 24, 51.) A narcotic tax of $8,100 had likewise been made against the taxpayer, which was satisfied out of the moneys seized (R. 144), leaving a balance of cash in the sum of $20,915.02, which amount was on or about October 30, 1945, duly and regularly applied against the unpaid income taxes of the taxpayer, and on the same date covered or deposited into a Treasury account. Since October 30, 1945, the money has been in the legal possession of the Treasury of the United States, and was not in the possession or control of the Collector. (R.51.) No claims for refund were filed by appellees for the recovery of the money in controversy as required by Section 3772 of the Internal Revenue Code. (R. 51.)

The basic and material facts as found by the District Court may be summarized as follows:

For a long time prior to October 11, 1945, the Chinese War Relief Association had been engaged in soliciting funds from organizations and individuals for the bene-

fit of homeless and destitute residents of China, as a result of which activities, the sum of $11,701.41 had been collected. On or about October 11, 1945, the above money was delivered to the taxpayer, as treasurer of the association, at his place of business. (R. 37-38.) At the time of the arrest of the taxpayer, as hereinbefore described, the $11,701.41 was seized by the narcotic agents and taken from the possession of the taxpayer, who had no title or interest therein, other than the safe-keeping thereof, and who was holding the money as treasurer for and on behalf of the association. (R. 38.)

Prior to October 11, 1945, the Wing Mae School in China, an association, acting through its chairman, Frank Ong, delivered to the taxpayer, as treasurer of the association, at his place of business, the sum of $1,914, for safe-keeping, to be held by the taxpayer as treasurer of the association. At the time of the arrest of the taxpayer, as hereinbefore described, the $1,914 was seized by the narcotic agents and taken from the possession of the taxpayer, who had no title or interest therein, other than the safe-keeping thereof, and who was holding the money as treasurer for and on behalf of the association. (R. 34-35.)

Prior to October 11, 1945, the Chinese School of Phoenix, Arizona, acting through its chairman, Yeun Lung, delivered to the taxpayer, as its treasurer, at his place of business, the sum of $1,500 to be held by the taxpayer, as treasurer. At the time of the arrest of the taxpayer, as hereinbefore described, the $1,500 was seized by the narcotic agents and taken from the possession of the taxpayer, who had no title or interest therein, other than the safe-keeping thereof and who was holding the money for and on behalf of the school as treasurer. (R. 36-37.)

Prior to October 11, 1945, the Chinese Chamber of Commerce, a corporation, acting through its agents, delivered to the taxpayer, as treasurer of the corporation, at his place of business, the sum of $838.40 to be held by the taxpayer, as treasurer of the corporation. At the time of the arrest of the taxpayer, as hereinbefore described, the $838.40 was seized by the narcotic agents and taken from the possession of the taxpayer, who had no title or interest therein, other than the safe-keeping thereof, and who was holding the money as treasurer for and on behalf of the corporation. (R.32-33.)

The District Court further found that the above-described fund, aggregating $15,953.81, was in the possession of the Collector and that the Collector had refused to deliver the fund to the appellees. (R. 33, 36, 37, 38.) [2]

On March 21, 1947, the District Court originally entered judgment against the Collector in the aggregate sum of $17,453.81. (R. 5, 41-43.) On March 31, 1947, a motion for new trial was filed in behalf of the Collector (R. 43-46), which motion came on for hearing on May 23, 1947, at which time the District Court granted the motion as to the fourth cause of action and denied it as to the remaining causes of action. (R. 48.) On May 26, 1947, the Collector filed a motion to vacate and set aside the judgment and to dismiss the complaint for lack of jurisdiction (R. 49-50) supported by an affidavit of the Collector (R. 50-51.) [3] On the same

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2 Since the fourth cause of action, wherein Henry Ong, as president of Sun Kwung Tong Company, an association, was plaintiff in the court below, was dismissed with prejudice (R.52), no reference to the findings made by the court below with respect thereto is herein made.

3 The belated filing of the motion to dismiss was caused by the discovery on or about May 26, 1947, that the money seized from the taxpayer and applied against his unpaid taxes, had been on October 30, 1945, covered and deposited into a Treasury account of the Treasury of the United States, and that therefore the Collector did not have the money in his possession at the time the suit was instituted.

date the motion was denied and final judgment was entered in favor of appellees and against the Collector for the aggregate sum of $15,953.81. (R. 42, 52.)

SPECIFICATION OF ERRORS TO BE RELIED UPON

The Collector relies upon the following errors as a basis for this appeal (R. 55-57):

1. The District Court erred in concluding that appellees were entitled to recover from the Collector the aggregate sum of $15,953.81 representing a portion of the amount seized by the Collector as the property of the taxpayer to satisfy an assessment and levy for unpaid taxes.

2. The District Court erred in failing to conclude that the Collector was entitled to judgment dismissing the complaint filed herein.

3. The District Court erred in finding that the Collector had in his possession the sum of $15,953.81 which it ordered to be paid to appellees herein.

4. The District Court erred in failing to make a finding that the Collector did not have in his possession the sum of $15,953.81.

5. The District Court erred in denying the Collector's motion to vacate and set aside the judgment entered herein.

6. The District Court erred in denying the Collector's motion to dismiss for lack of jurisdiction for the reason that it was without jurisdiction of the subject matter of the complaint filed herein since appellees had not filed claims for refund as required by Section 3772 of the Internal Revenue Code.

7. The District Court erred in denying the Collector's motion to dismiss for lack of jurisdiction for the

reason that it was without jurisdiction over the Collector or over the fund which was ordered to be paid by him to appellees, since the fund, representing a portion of the amount seized from the taxpayer, was not in the possession of or under the control of the Collector, the fund having been covered and deposited into the Treasury of the United States prior to the institution of this proceeding pursuant to the provisions of Section 3971 of the Internal Revenue Code.

SUMMARY OF ARGUMENT

The order of the District Court denying the Collector's motion to vacate and set aside the judgment entered herein and to dismiss the complaint was erroneous because the court was clearly without jurisdiction over the Collector or over the money which was ordered to be paid to appellees since no claims for refund of the amount sought to be recovered had been filed, as required by Section 3772 of the Internal Revenue Code. That section of the statute provides that no suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax, or of any sum alleged to have been in any manner wrongfully collected until a claim for refund has been duly filed with the Commissioner of Internal Revenue.

The District Court's finding that the Collector had in his possession the sum of $15,953.81, which was ordered to be paid to appellees, was also erroneous because the record shows that this money, together with the balance of the amount seized from the taxpayer and applied to his unpaid taxes, had been covered or deposited by the Collector prior to the institution of the suit in a Treasury account of the Treasury of the United States, as required by Section 3971 of the Internal Revenue Code.

Under all of the circumstances, the District Court was clearly without jurisdiction in rendering a money judgment against the Collector. If the funds had been in the possession of the Collector, it is possible that the court could have ordered the money to be returned. However, as the money was collected in good faith and under color of right and turned into the Treasury in due course, there seems to be little doubt but that the recovery thereof can only be accomplished by following the procedure required by Section 3772 of the Code, or in a suit against the United States under the Tucker Act, based upon an implied contract.

ARGUMENT

I

THE DISTRICT COURT DID NOT HAVE JURISDICTION TO ENTERTAIN THE INSTANT SUIT AGAINST THE COLLECTOR

Section 3772 (a) (1) of the Internal Revenue Code, *supra,* provides that no suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any sum alleged to have been collected without authority, or in any manner wrongfully collected, until a claim for refund has been duly filed with the Commissioner according to the provisions of law in that regard, and the Regulations of the Secretary established in pursuance thereof. Section 3772 (a) (2) of the Code further provides that no suit or proceeding shall be begun before the expiration of six months from the date of filing of such claim unless the Commissioner renders a decision thereon within that time, nor after two years from the date of official disallowance of the claim. *Moore Ice Cream Co.* vs. *Rose,* 289 U. S. 373.

Congress has thus provided an orderly method for obtaining repayments of overpayments of taxes or sums alleged to have been wrongfully collected in any manner, or which may have improperly come into the possession of the Treasury of the United States. The phraseology of Section 3772 in all its parts imports the specific procedure to be followed before recovery of tax collections by suit can be obtained.

We submit that the order entered by the court below, denying the Collector's motion to vacate and set aside the judgment entered in favor of appellees and against the Collector, and its failure to dismiss the complaint for lack of jurisdiction was clearly erroneous. The record shows on its face that no claims for refund were filed by appellees for the recovery of the fund in controversy, as required by Section 3772 (a) and the Regulations promulgated pursuant thereto. Treasury Regulations 111, Sec. 29.322-3.

The filing of a claim as a prerequisite to a suit to recover taxes paid or erroneously collected is a familiar provision of the revenue laws, compliance with which may be insisted upon. *United States* vs. *Felt & Tarrant Co.,* 283 U. S. 269. The main object of the requirement is to advise the Commissioner of the demands or claims intended to be asserted so as to insure an orderly administration of the revenue. Here, there was no compliance with the statute, nor was there a waiver of its conditions, since the Commissioner had no knowledge of the demands made by appellees, and took no action with respect thereto. *United States* vs. *Felt & Tarrant Co., supra; Tucker* vs. *Alexander,* 275 U. S. 228; *Moore Ice Cream Co.* vs. *Rose, supra.*

There can be no question but that the Collector was acting in his official capacity at the time of the receipt

by him of the money from the narcotic agents. The record shows that an assessment had been duly and regularly made by the Commissioner against the taxpayer for unpaid 1943 and 1944 income taxes, and that after the money seized from him had been turned over to the Collector, the sum of $20,915.02 thereof was on October 30, 1945, applied against the unpaid income taxes of the taxpayer. We submit that the Collector, acting under the directions of the Commissioner, was under a ministerial duty to proceed to collect the assessment in any manner whatever upon receipt by him of the Commissioner's assessment list. Section 3641, Internal Revenue Code (26 U.S.C. 1940 ed., Sec. 3641). There was nothing left to his discretion. See *Moore Ice Cream Co.* vs. *Rose, supra,* p. 381.

The authorities have generally recognized the rule that where a Collector is sued on the theory that he has wrongfully collected money for taxes, the taxpayer or the person from whom the money was collected, is required to first comply with the provisions of Section 3772 of the Internal Revenue Code and that a failure to so comply is jurisdictional. This rule is equally applicable where money has been wrongfully collected from one person and applied to the taxes of another. In *Karno-Smith Co.* vs. *Maloney,* 112 F. 2d 690 (C.C.A. 3d) the court held (p. 692) that Section 3772 (a) (1) of the Internal Revenue Code clearly authorized the recovery of "any sum * * * in any manner wrongfully collected", and that "the statute is sufficiently broad to cover a payment by one other than a taxpayer." *White* vs. *Hopkins,* 51 F. 2d 159 (C.C.A. 5th); *United States* vs. *S. F. Scott & Sons,* 69 F. 2d 728 (C.C.A. 1st).

In *Bladine* vs. *Chicago Joint Stock Land Bank,* 63 F. 2d 317 (C.C.A. 8th), the question involved was somewhat similar to that present here. In that case an as-

sessment of a deficiency estate tax had been made against the estate of a decedent in June, 1924. The decedent died in 1918. Prior to June, 1924, the heirs of the decedent had borrowed money from the Chicago Joint Stock Land Bank and others, and had given a mortgage upon lands inherited from the decedent to secure such loans. These mortgages were foreclosed as defaults occurred; the lands were bid in by the mortgagees, and sheriffs' deeds were issued to them, so that each of the mortgagees owned lands which previously had belonged to the decedent, at the time the Collector notified them that he would distrain on the lands unless payment of the estate tax assessment was made. In order to avoid having the lands so acquired sold by the Collector under distraint proceedings, and to avoid clouds upon their title, the owners of the land finally paid the tax under protest. Subsequently, a claim for refund was filed by them and upon rejection of the claim actions were brought by the Chicago Joint Stock Land Bank and others against the Collector, and consolidated for trial. The Government contended that the claim filed was defective, which precluded the refund of the money which had been unlawfully exacted. The court, after commenting on the sufficiency of the facts set forth in the claim for refund as a ground for the recovery of the money in controversy, said (p. 320):

> U. S. Code, title 26, Sec. 156, 26 USCA Sec. 156 (see U. S. C. Supp. VI, title 26, Sec. 1672), however, makes no express distinction between an illegal tax and a sum wrongfully collected; and in *Sage* vs. *United States, supra,* page 36 of 250 U. S., 39 S. Ct. 415, 416, the Supreme Court uses this broad language with reference to suits against a collector, "It is true that the statutes modify the common law liability for money wrongfully collected by duress so far as to require a preliminary ap-

peal to the Commissioner of Internal Revenue before bringing a suit''; so the contention of the Collector, that the appellees were required to show the same meticulous compliance with the provisions of the statute and regulations relating to a claim for refund as any taxpayer, seems justified. That a strict compliance is required, if not waived, as a prerequisite to suits by taxpayers, is well settled. *Maas & Waldstein Co.* vs. *United States,* 283 U. S. 583, 51 S. Ct. 606, 75 L. Ed. 1285; *Taber* vs. *United States* (C.C.A. 8) 59 F (2d) 568. See also, *United States* vs. *Felt & Tarrant Mfg. Co.,* 283 U. S. 269, 51 S. Ct. 376, 75 L. Ed. 1025; *United States* vs. *Henry Prentiss & Co.,* 53 S. Ct. 283, 77 L. Ed.—, opinion filed January 9, 1933; *United States* vs. *Factors & Finance Co.,* 53 S.Ct.287, 77 L. Ed.—, opinion filed January 9, 1933; *Tucker* vs. *Alexander* (C.C.A. 8), 15 F. (2d) 356; *Red Wing Malting Co.* vs. *Willcuts* (C.C.A. 8) 15 F. (2d) 626, 49 A.L.R. 459; *J. P. Stevens Engraving Co.* vs. *United States* (C.C.A. 5) 53 F. (2d) 1. We have, however, no doubt that the claim for refund with which we are concerned complied with the law and gave to the Commissioner all the information to which he was entitled, and all that it was necessary for him to have in order to satisfy himself that the appellees were making claims for the recovery of sums wrongfully exacted by the collector of internal revenue, and the precise grounds thereof.

II

THE JUDGMENT ENTERED BY THE DISTRICT COURT WAS ERRONEOUS BECAUSE IT IS IMPOSSIBLE FOR THE COLLECTOR TO COMPLY WITH ITS TERMS

The judgment order entered by the court below directed the Collector to pay over to the appellees the aggregate sum of $15,953.81. We submit that such an

order was erroneous because the record shows on its face that the Collector cannot comply with its terms.

The record shows that after the money received by the Collector from the narcotic agents had been credited against the unpaid taxes of the taxpayer, it was immediately covered and deposited into a Treasury account, pursuant to the specific directions contained in Section 3971 of the Internal Revenue Code, *supra.* [4] Since October 30, 1945, the money has been in the legal possession of the Treasury of the United States. We submit that the moment the money was deposited to the credit of the Treasurer of the United States, the power of the Collector over the fund ceased. Money in the United States Treasury may only be paid out pursuant to an act of Congress (Constitution of the United States, Art. I, Sec. 9, Clause 7) and the Collector has been granted no authority to return money deposited by him. There is no statute that authorizes a Collector to demand the summary return of tax collections out of the Treasury or that contemplates that he shall be able personally to return them to the person from whom the taxes were collected. *Elliott* vs. *Swartwout,* 10 Pet. 137. Neither does a Collector have any authority to make a claim upon the Treasury for a direct refund in his official name, and the Regulations of the Treasury Department dealing with the filing of claims for refund (Sec. 29.322-3, Regulations 111) specifically provide that a claim which does not comply with the provisions of those Regulations will not be considered for any purpose as a claim for refund. The fact that a certificate of probable cause was issued by the court below (R.47-48), does not give the Collector any control over the funds in the Treasury, but simply converts the suit against the Collector in effect

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[4] The exceptions referred to in Section 3971 are not pertinent here.

into one against the United States. Moreover, the certificate of probable cause does not provide any means for circumventing the requirements of Section 3772 of the Code and the Treasury Regulations promulgated pursuant thereto for obtaining a refund of money wrongfully or erroneously collected. *Sheehan* vs. *Hunter,* 133 F. 2d 303, 304 (C.C.A. 5th).

III

THE DISTRICT COURT HAD NO JURISDICTION TO ENTER MONEY JUDGMENTS AGAINST THE COLLECTOR

It seems clear that the court below erred in rendering money judgments against the Collector. If the funds had been in the possession of the Collector and he had not deposited them in the depository of the Treasury of the United States, it is possible that the court below could have directed their return. [5] *Long* vs. *Rasmussen,* 281 Fed. 236 (Minn.). However, under all of the circumstances, there seems to be little doubt that the recovery of the money could only be accomplished by following the procedure required for the recovery of tax wrongfully or erroneously collected, as provided by Section 3772 of the Code, or in a suit against the United States under the Tucker Act, c. 359, 24 Stat. 505, based upon an implied contract.

In *Kirkendall vs. United States,* 31 F. Supp. 766 (C. Cls.), a somewhat similar situation was present. In that case, the administrators of the estate of James F. Kirkendall, deceased, brought an action against the United States based upon an implied contract for the

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[5] In Gee Soot Hong vs. Stuart, Collector, the companion case consolidated for trial with the instant cause (R.27), the court below entered judgment directing the Collector to return two uncashed cashiers' checks which had likewise been seized from the taxpayer and turned over to the Collector and which checks at the time that action was instituted, were still in the possession of the Collector.

recovery of monies appropriated by the defendant and applied against the unpaid taxes of another. It appears that Kirkendall and others had been arrested in connection with the fraudulent use of the mails. After his arrest, the contents of a safe deposit box, consisting of money, was confiscated by the police officers, and later turned over to the postal inspectors to be used as evidence in the trial of Kirkendall and others for use of the mails to defraud. Thereafter, an assessment of income taxes was made against one Oscar M. Hartzell, the promoter of the scheme, and pursuant to a warrant for distraint and levy made on the postal inspector, the Collector of Internal Revenue obtained the money taken from the safe deposit box and applied that amount to the outstanding assessment against Hartzell. After police questioning Kirkendall was released under bond and died approximately three hours after his release. The evidence in the case clearly established that the money belonged to Kirkendall and that it did not belong to Hartzell. The Court of Claims found that the United States had in its possession money which had been wrongfully obtained from plaintiff and her husband, and concluded that she, as administratrix of her husband's estate, was entitled to recover the money so seized. In so holding, the court said (pp. 769-770):

> When the Government has illegally received money which is the property of an innocent citizen and when this money has gone into the Treasury of the United States, there arises an implied contract on the part of the Government to make restitution to the rightful owner under the Tucker Act, 24 Stat. 505, and this court has jurisdiction to entertain the suit.
>
> As was said by the Supreme Court in the case of *United States* vs. *State Bank,* 96 U.S. 30, 35, 36, 24 L. Ed. 647:

"* * * An action will lie whenever the defendant has received money which is the property of the plaintiff, and which the defendant is obliged by natural justice and equity to refund. The form of the indebtedness or the mode in which it was incurred is immaterial.

* * *

"But surely it ought to require neither argument nor authority to support the proposition, that, where the money or property of an innocent person has gone into the coffers of the nation by means of a fraud to which its agent was a party, such money or property cannot be held by the United States against the claim of the wronged and injured party."

See also *Dooley* vs. *United States,* 182 U.S. 222, 21 S. Ct. 762, 45 L. Ed. 1074; *Basso* vs. *United States,* 239 U. S. 602, 36 S. Ct. 226, 60 L. Ed. 462; and *Bull* vs. *United States,* 295 U. S. 247, 55 S. Ct. 695, 79 L. Ed. 1421.

See also *Schwartz* vs. *United States* (S.D. N.Y.), decided January 7, 1939 (24 A. F. T. R. 1140).

CONCLUSION

The case should be remanded for the entry of a judgment dismissing the complaint.

Respectfully submitted,

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January, 1948.